

A preliminary hearing was held on the initial claim against Venator Group, Docket No. 258,968, on April 25, 2001. On April 27, 2001, the claimant filed a Motion to Dismiss the

claim against Swift-Echrich, Inc., Docket No. 259,985, pursuant to K.A.R. 51-3-1. The Motion to Dismiss noted the injuries which are the subject of the claim against Swift-Echrich, Inc., actually arose in the first docketed claim against Venator Group. The Motion to Dismiss concluded with the statement that claimant's physician advised her that employment at Swift-Echrich, Inc. neither caused nor aggravated her injuries. Attached to the Motion to Dismiss was an Order of Dismissal for the signature of the Administrative Law Judge and signed by the attorneys for respondent and claimant.

On April 30, 2001, the Administrative Law Judge denied the claim against Venator Group in Docket No. 258,968 finding claimant had failed to provide timely written claim. In a letter dated May 1, 2001, the Administrative Law Judge denied the Motion to Dismiss the claim against Swift-Echrich, Inc., in Docket No. 259,985. The letter to claimant's attorney provided: "Your motion to dismiss the claim against Armour-Swift appears to be irresponsible, especially as the recent preliminary hearing in Ms. Powe's other docketed claim suggests that Armour may bear some liability. Your motion is denied."

On May 4, 2001, respondent requested review of the decision denying the Motion to Dismiss. The respondent contends the Act specifically allows the parties to voluntarily dismiss a claim and the Administrative Law Judge's refusal exceeds his authority. Respondent further contends the Administrative Law Judge's consent is unnecessary pursuant to K.A.R. 51-3-1 because the regulation does not confer discretion upon the Administrative Law Judge.

The claimant, in her brief to the board, has admittedly changed her position and asks the case not be dismissed.

Respondent contends the matter should be remanded to the Administrative Law Judge with directions to grant the motion at which time the Administrative Law Judge can address the issue of whether the claimant can withdraw her motion.

The issues now before the Board are:

- (1) Does the Board have jurisdiction to review the Order denying the Motion to Dismiss?
- (2) If so, did the Judge err?

The Board's jurisdiction to review appeals is governed by K.S.A. 44-534a and K.S.A. 44-551. Those statutes grant the Board the jurisdiction to review (1) certain preliminary hearing findings and (2) final orders and awards. Neither statute grants the Board the authority to review the interlocutory order now presented.

Because this is not an appeal from a preliminary hearing held pursuant to K.S.A. 44-534a, that statute does not give the Board jurisdiction to review the order in question.

Because the denial of a request to dismiss is not in the nature of a final order or award but interlocutory in nature, K.S.A. 44-551 does not give the Board jurisdiction to review that denial.

Respondent relies upon the holding in *Shain v Boeing Military Airplanes*, 22 Kan. App. 2d 913, 924 P.2d 1280 (1996), for the proposition that a Motion to Dismiss is not a preliminary order and is therefore subject to review. In *Shain* the Court determined that since a Motion to Dismiss was not a preliminary award it was subject to review under the statutory language of K.S.A. 44-551(b)(1) which then provided that all orders, etc. of an Administrative Law Judge were subject to review by the Board. Subsequent to the decision in *Shain*, the legislature amended K.S.A. 44-551(b)(1) to provide that all *final* orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto are subject to review by the Board. Therefore, review by the Board is limited to final orders, awards, modification of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto. *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

Because the denial of the Motion to Dismiss is an interlocutory decision and not a final decision, the appeal must be dismissed.

#### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated May 1, 2001, is hereby dismissed.

#### **IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Richard H. Seaton, Attorney for Claimant  
Mark E. Kolich, Attorney for Respondent  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director